

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/21655

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: _____
	23/8/2008
	DATE
	SIGNATURE

In the matter between:

CASH ON DEMAND (KZN) (PROPRIETARY) LIMITED

Plaintiff

and

ANTON VAN ZYL

Defendant

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff has instituted action against the defendant for damages based on a written contract of sale entered into between the plaintiff and a

company called G & C Shelf 101 (Pty) Ltd ("*G & C Shelf*"), on 18 December 2007. I shall henceforth refer to the contract as "*the 18/12/2007 contract*".

[2] The plaintiff is a company duly registered and incorporated in terms of the Company Laws of South Africa ("*the Companies Act No 61 of 1973*") and traded from Sunningdale, KwaZulu-Natal. The defendant is an attorney and conveyancer practising from Gauteng Province.

THE CASE ON THE PLEADINGS

[3] For the sake of completeness and better understanding of the issues between the parties, paras 3 to 9 of the amended particulars of claim alleged as follows:

- "3. *On a date prior to 18 December 2007, during the course of negotiations between the Plaintiff and G & C Shelf 101 (Pty) Ltd ('the company'), the Defendant expressly, alternatively impliedly represented to the Plaintiff that:*
 - (a) *No prior cession or pledge or encumbrance existed in respect of the surplus equity that was due to be paid to the company pursuant to a sale agreement concluded between the said company and Char-Trade 246 CC in respect of Erf 297, Witkoppen Extension, Gauteng;*
 - (b) *One Ferdi de Lange was lawfully the sole shareholder and director of the company and that he was duly authorised to represent the company.*
4. *The representation was material and was made with the object of inducing the Plaintiff to enter into a contract with the company in respect of which the Plaintiff would purchase the surplus equity that was due to be paid to the company pursuant to a sale agreement concluded between the said company and Char-Trade 246 CC in respect of the property for an initial payment amounting to R2 500 000,00.*

5. *Following upon these negotiations the Plaintiff, duly represented by its authorised representative and the company, duly represented by the Defendant, warranting his authority to represent the said company, concluded a master discounting agreement, a copy of which is annexed hereto marked 'POC1'.*
6. *Plaintiff, relying on the truth of the representations pleaded hereinabove, concluded annexure 'POC1' to the Particulars of Claim and paid the sum of R2 500 000,00 to the company on 21 December 2007.*
7. *The representations were false in that:*
 - (a) *At the time when the Defendant made the said representations and when the agreement was concluded the company, duly represented by the Defendant, had concluded a bridging finance agreement on 3 December 2007 with Paforma (Pty) Ltd in terms of which the company had ceded the surplus equity that was due to be paid to the company in respect of a sale agreement concluded between the company and Char-Trade 246 CC in respect of Erf 297, Witkoppen Extension, Gauteng, to Proforma (Pty) Ltd.*
 - (b) *Ferdi de Lange was not the sole lawful shareholder and director of the company, nor was he duly authorised to represent the company.*
8. *The Defendant was negligent in making the representations aforesaid in that:*
 - (a) *he failed to disclose, when he ought reasonably to have done so, that the latter agreement had been concluded on 3 December 2007;*
 - (b) *he failed to disclose, when he ought reasonably to have done so, that he represented the company in concluding the latter agreement on 3 December 2007;*
 - (c) *he did not make proper enquiries, when he ought reasonably to have done so, to establish whether Ferdi de Lange was lawfully the sole shareholder and director of the company and duly authorised to represent the company.*
9. *As a consequence of the Defendant's representation the Plaintiff has suffered damages in an amount of R2 817 260,27."*

[4] In the plea, the defendant essentially denied the contents of paras [3] and [4] of the particulars of claim. In regard to paras [5] to [9] of the particulars of claim, the defendant pleaded as follows:

"5 AD PARAGRAPH 5

- 5.1 *The Defendant admits that the Defendant signed (and initialled where applicable) Annexure 'POC1' to the Plaintiff's Amended Particulars of Claim and in so doing that he warranted that he was authorised to sign same.*
- 5.2 *The Defendant specifically pleads that he was duly authorised by G & C Shelf 101 (Proprietary) Limited to sign Annexure 'POC1' to the Plaintiff's Amended Particulars of Claim.*
- 5.3 *Save as aforesaid, the Defendant denies each and every remaining allegation contained in this paragraph as if specifically traversed.*

6 AD PARAGRAPH 6

- 6.1 *The Defendant admits that the Plaintiff paid G & C Shelf 101 (Proprietary) Limited R2,5 million on or about 21 December 2007.*
- 6.2 *Save as aforesaid, the Defendant denies each and every remaining allegation contained in this paragraph as if specifically traversed.*

7 AD PARAGRAPH 7(a)

- 7.1 *The Defendant denies each and every allegation contained in this paragraph as if specifically traversed.*
- 7.2 *Without derogating from the generality of the aforesaid denial, the Defendant specifically pleads that he included on Annexure 'POC1' a reference thereto that a previous undertaking in an amount of R2,5 million had been given and further that notwithstanding same the Plaintiff made no enquiries regarding same to the Defendant, or at all.*

8 AD PARAGRAPH 7(b)

- 8.1 *The Defendant denies each and every allegation contained in this paragraph as if specifically traversed.*

8.2 *Without derogating from the generality of the aforesaid denial, the Defendant specifically pleads that:*

8.2.1 *He only advised the Plaintiff that Ferdi de Lange was the sole director of G & C Shelf 101 (Proprietary) Limited as he had established by doing a companies search with CIPRO.*

8.2.2 *He had no involvement and/or interest with/in G & C Shelf 101 (Proprietary) Limited other than attending to the relevant instruction at issue as conveyancer and employee of De Lange Incorporated (in which practice the Defendant had no interest whatsoever other than as employee); and*

8.2.3 *That the Defendant's only means of verifying any objective records relating to G & C Shelf 101 (Proprietary) Limited was to attend to a companies search in respect of same, which he duly did.*

9 *AD PARAGRAPH 8 (IN TOTO)*

Save insofar as the Defendant has already dealt with the allegations contained in this paragraph hereinabove, in which event the Defendant persists with what it has pleaded in regard same and prays that same be read as if specifically incorporated herein, the Defendant denies each and every remaining allegation contained in this paragraph as if specifically traversed.

10 *AD PARAGRAPH 9*

The Defendant denies each and every allegation contained in this paragraph as if specifically traversed."

In the rest of the plea, the defendant admitted receipt of demand, and his refusal to pay based on the reasons advanced in the plea.

THE COMMON CAUSE FACTS

[5] From the pleadings and evidence adduced, certain facts became common cause or were not seriously disputed. It is common cause that although the plaintiff in the particulars of claim sought the sum of R2 817 260,17, the amount now claimed is the sum of R2 500 000,00 plus interest and costs. This is the amount actually paid by the plaintiff to G & C Shelf on 21 December 2007 pursuant to the 18/12/2007 contract. In addition, the defendant admitted in the plea that the amount was paid to G & C Shelf. It is also common cause that during the conclusion of the 18/12/2007 contract, the defendant, as attorney and conveyancer, acted as the duly appointed agent of G & C Shelf. In such capacity, the defendant completed, initialled and signed the agreement. Annexure "POC1" to the particulars of claim as well as the conditions and terms thereof. This led to the plaintiff making payment of R2 500 000,00 to G & C Shelf. The plaintiff in effect was purchasing the surplus equity that was to be due to G & C Shelf pursuant to a sale agreement concluded between G & C Shelf, as seller, and a company called Char-Trade 246 CC, as purchaser ("*Char-Trade*") in respect of immovable property known as Erf 297, Witkoppen Extension, Gauteng ("*the immovable property*"). It is further common cause that the latter sale fell through and never materialised. G & C Shelf, of which one Ferdi de Lange, an attorney, was the sole shareholder and director ("*De Lange*"), was later liquidated. De Lange was subsequently struck off the roll of attorneys. It is further common cause that the plaintiff had not been refunded the sum of R2 500 000,00. Finally, and what is of utmost importance in this matter, is that it is equally not in dispute that at the time of the 18/12/2007 contract, G & C Shelf had concluded an agreement on 3/12/2007 with a company called Paforma Property Finance

(Pty) Ltd ("*Paforma*") for the sale and cession of the very same surplus equity forming the *merx* of the 18/12/2007 contract. I shall henceforth, and for convenience, refer to this agreement as "*the 3/12/2007 contract*".

THE ISSUE OF DETERMINATION

[6] The only issue for determination in this trial is whether the defendant, as agent for G & C Shelf, during the negotiation and conclusion of the 18/12/2007 contract, fraudulently or negligently represented to the plaintiff by not revealing the existence of the 3/12/2007 contract. In other words, whether the defendant had a duty to disclose the 3/12/2007 contract, and if he did not make such disclosure, whether as agent, he is liable for damages suffered by the plaintiff. The plaintiff contends that the defendant had a duty to disclose and not to act negligently. On the other hand, the defendant, in short, argued that the plaintiff cannot succeed in its claim in law as negligence does not suffice to procure the liability of an agent in this case. The main contention of the defendant is essentially that the plaintiff has not proved the case it has pleaded.

THE EVIDENCE FOR PLAINTIFF

[7] In support of its case, the plaintiff led the evidence of Mr Warren Lesley Mellow (not Miller as reflected in the transcript) ("*Mellow*"). He testified that at the time of the 18/12/2007 contract, he was employed as the plaintiff's legal adviser. His duties entailed to, *inter alia*, vetting deals and transactions of a

certain credit limit on behalf of the plaintiff. He investigated transactions, packaged them and submitted such deals to the board of directors of the plaintiff for approval and/or rejection. Prior to the 18/12/2007 contract, Mellow had concluded about half a dozen other transactions successfully, with the defendant. In negotiating with the defendant, leading to the transaction under discussion, Mellow sought from the defendant clarification of certain issues as reflected on Annexure "POC1". This he did by addressing an e-mail to the defendant on 18/12/2007. The e-mail is contained at pages 8 and 9 of Annexure "A". Mellow received a reply to his e-mail from what he assumed was authored by the defendant. The answers to his queries were made below the questions of his original e-mail. In other words, the reply was not on a separate e-mail.

- 7.1 Mellow testified that the 18/12/2007 contract was essentially a bridging finance agreement, commonly known as a discounting agreement in terms of which the plaintiff intended to purchase G & C Shelf's right, title and interest in the surplus sale proceeds involving the immovable property mentioned above. In terms of the agreement the surplus which would become due to G & C Shelf upon registration of transfer of the immovable property to the purchaser, Char-Trade, was the sum of R9,7 million. The plaintiff purchased this surplus equity by paying to G & C Shelf in two instalments. The initial payment was the sum of R2,5 million (the subject-matter of the instant trial), and the balance due would be paid upon registration of transfer. G & C Shelf

was to cede the surplus to the plaintiff at the stage of transfer. In this regard, clause 7 of the terms and conditions of the 18/12/2007 contract (the Master Discounting Agreement) provides as follows:

"7.1 The Applicant hereby sells his right, title and interest in and to the Claim to the Discounter, and the Discounter hereby purchases same, on the terms set out herein.

7.2 By exercising this Agreement the Applicant hereby cedes, transfers and makes over to the Discounter his right, title and interest in and to the Claim. Such cession and transfer shall immediately be of full force and effect, without any further act of delivery."

7.2 Mellow testified that he addressed the queries to the defendant in the e-mail of 18/12/2007 more particularly as at the time there had been widespread fraud in the industry. There was a tendency of double discounting whereby a party would sell the same equity twice to different parties. He was guarding against such fraud by sending queries to the defendant. He expected honest answers from the defendant based on previous and successful business transactions between them.

7.3 Mellow was adamant and consistent throughout that at no stage during the queries and negotiations and conclusion of the 18/12/2007 contract, did the defendant disclose the already existing contract of the 3/12/2007 which G & C Shelf had concluded with Paforma. Mellow said that had he known or

been told by the defendant of the 3/12/2007 contract, he would not have recommended the sale agreement to his board of directors and the plaintiff would not have entered into the agreement with G & C Shelf at all.

- 7.4 Mellow testified on the various clauses of the 18/12/2007 contract, and in particular the clause in which G & C Shelf, through the defendant, gave various warranties, such as clause 20. For example, clause 20.12 provides:

“the Applicant is not aware of any fact, matter or circumstances pertaining to the Applicant or the Property which might prevent the Property from being transferred to the Purchaser in accordance with the Sale Agreement or might cause the Transfer Date to be delayed more than ninety days after the Signature Date.”

Clause 20.13 provides:

“the full amount of the Surplus will pursuant to this Agreement and the Sale Agreement, be payable to the Discounter on the Transfer Date.”

Clause 20.15 provides:

“the Discounter shall not be required to do anything (other than comply with this Agreement) or to pay any amount in order to procure the transfer of the Property to the Purchaser.”

More importantly, clauses 20.21 and 20.22, respectively, provide as follows:

"the Property is not subject to any attachment in terms of a warrant of execution or any similar court process;"

and

"the Claim or the Surplus, or any part thereof, are not subject to a prior cession, pledge or similar encumbrance."

Clause 23, styled "EFFECT OF WARRANTIES" provides:

"The Applicant acknowledges that the Discounter is entering into this Agreement in reliance on the abovementioned warranties, representations and undertakings and that if any of these warranties, representations and undertakings are or become to any extent inaccurate or breached, the Applicant will have committed a fraud against the Discounter."

All of these warranties, according to Mellow, led him to believe honestly that the plaintiff could safely enter into the 18/12/2007 contract. He took the word of the defendant at face-value based on the several successful dealings they had before. Had he known about the 3/12/2007 contract, he would not have entered into the 18/12/2007 contract. Paforma was one of the plaintiff's competitors at the time.

- 7.5 Mellow testified further that he later discovered a copy of the 3/12/2007 contract which G & C Shelf had concluded with Paforma. This contract is to be found on Annexure "A33". It is truly unnecessary to repeat all the evidence of Mellow regarding the 3/12/2007 contract as well as the terms and conditions

thereof. The contract is not in dispute. However, certain significant features thereof are relevant. It was also a discounting agreement entered into between Paforma and G & C Shelf in respect of the surplus equity of the immovable property as that of the 18/12/2007 contract. The purchaser was Char-Trade. The transferring conveyancers were De Lange Property Law, being De Lange's law firm, the principal or employer of the defendant. The latter was designated as the contact person.

- 7.6 At Annexure "A40" of the contract, is a "*conveyancer's Confirmation and Undertaking*", certificate completed by the defendant and signed by him. In the certificate, the defendant confirms that, *inter alia*, "*We have been appointed as the conveyancer in the transaction to give effect to the transfer of the property from the seller to the purchaser*". Further that, "*The conveyancer has been instructed to attend to and is proceeding with the transfer of the property*". The selling price was R125 200 000,00, from which Paforma would receive the surplus equity of about R12 500 000,00 upon registration of transfer to the purchaser, Char-Trade. The involvement of the defendant and his signature to the Paforma transactions are not in dispute. According to Mellow it was not necessary for the plaintiff to register as a financial service provider. The transaction with G &

C Shelf and the defendant entailed the purchase of rights and a sale of a cession of such rights. It was not a loan agreement.

THE CROSS-EXAMINATION OF MR MELLOW

[8] In cross-examination Mellow testified that the efforts by the plaintiff to recover the debt from Ferdi de Lange were frustrated by the successful sequestration of G & C Shelf and the striking off the roll of attorneys of De Lange. Mellow had previously dealt with De Lange, and was not aware that he was a dishonest businessman. He was surprised to hear the version that the conveyancer was the defendant only, and not De Lange. He was not aware that at the time of the 18/12/2007 contract, De Lange was the sole director of G & C Shelf. Neither was he aware of the internal arrangements of the De Lange firm or company. All he knew was that the defendant was the appointed conveyancer, and owed a duty of care to the plaintiff. He agreed that the resolution of G & C shelf in Annexure "A6", appointed the defendant as its agent to enter into the 18/12/2007 contract.

[9] The bulk of the cross-examination of Mellow consisted of legal matter and argument. These included the version that the defendant acted as an employee or agent for G & C Shelf only based on instructions of De Lange the sole director, and the legal matter of establishing the shareholding and directorships of companies. The interpretation of certain clauses of the 18/12/2007 contract were also canvassed and argued with Mellow. The cross-examination ignored the critical fact that the defendant transacted with

Mellow, a layperson, not only as an agent of G & C Shelf, but also a conveyancer and qualified attorney. Mellow admitted to have had limited legal training only. Mellow was surprised at the version that the defendant never saw Mellow's e-mail of 18/12/2007 even though it was generated from the defendant's computer. Mellow conceded that the plaintiff sought all kinds of assurances and information from the defendant or G & C Shelf prior to concluding the 18/12/2007 contract, as a normal procedure of vetting a deal.

[10] The cross-examination also consisted of a number of versions which would be advanced by the defendant. However, as it turned out later, and discussed below, none of the versions were confirmed by the defendant himself. Mellow could not comment on the version that if the defendant really wanted to mislead, he would not have inserted on Annexure "POC1" to the particulars of claim the contingency undertaking of R2,5 million. This inscription, handwritten by the defendant on the application form "A4", appears as "*other/undertaking*" just before the net surplus equity of R9,7 million, which was the amount the plaintiff intended to purchase under the 18/12/2007 contract. However, in re-examination, Mellow testified that by inserting the R2,5 million commitment as above, the defendant in no way indicated that at that stage there was already in place the contract of 3/12/2007 involving Paforma.

THE APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[11] Mellow was the only witness for the plaintiff and also in the trial. Thereafter the defendant launched an application for absolution from the instance, which was opposed. In the end, I ruled that the application had no merit. I, at the same time, undertook to furnish reasons for the ruling in the ultimate judgment. The reasons furnished hereafter are such reasons. The defendant closed his case without testifying or leading evidence.

SCRUTINY OF THE PLAINTIFF'S CLAIM

[12] I must at the outset observe that the manner in which the plaintiff's particulars of claim were framed, is not a model of perfection. It is not perfectly clear that the claim is founded on delict. However, as far back as 1937, the Court in *Shill v Milner* 1937 (A) at p 105 said:

"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings."

In my view, this legal principle still holds good to date. Had the plaintiff proceeded in contract in this matter, it would have had problems as discussed later in the judgment (cf *Johnson v Jainodien and Another* 1982 (4) SA 599 (C)).

[13] It is not in dispute that the defendant in concluding the 18/12/2007 contract with the plaintiff acted throughout as the duly appointed agent of G & C Shelf of which De Lange was the sole director and shareholder. Not only the undisputed evidence, but also the resolution passed by G & C Shelf on 14/12/2007, makes it clear:

"2. *That Anton van Zyl in his capacity as a representative and agent of the company be and is hereby authorised to enter into and make application for the discounting and further to sign the application and master discounting agreement.*"

[14] A close scrutiny of the particulars of claim, as quoted earlier in the judgment, in spite of certain shortcomings, and the defendant's argument to the contrary, shows that the plaintiff in fact relies on delict in its claim. There are allegations that the defendant "*expressly, alternatively impliedly represented to the plaintiff*", and that "*the representation was material and was made with the object of inducing the plaintiff to enter into the contract*"; and that, "*the representations were false*", and that "*the defendant was negligent in making the representations in that he failed to disclose, when he ought reasonably to have done so, and that an earlier agreement had been concluded on 3 December 2007*", and "*as a consequence of the defendant's representation the plaintiff has suffered damages ...*". The issue whether De Lange, representing G & C Shelf, gave dubious and questionable instructions to the defendant is truly irrelevant. There is no evidence at all that subsequent to the conclusion of the 18/12/2007 agreement with plaintiff, De Lange expressed any unhappiness with the manner in which the defendant,

as agent, carried out his mandate. The essence of the plaintiff's claim therefore is that the defendant failed to disclose to it the existence of the 3/12/2007 contract involving Paforma.

SOME APPLICABLE LEGAL PRINCIPLES

[15] I deal with some applicable principles applicable to the above set of facts. In the Law of Agency 4 ed by A J Kerr, at Chapter 14, pp 221-222, it is said:

"If the agent both (1) makes the representation, and (2) knows (i.e. is conscious of the fact) that it is false, or (b) does not have an honest belief in its truth, being reckless, careless whether it be true or false, the legal position is the same as if the principal himself had made the representation with the requisite state of mind ... The Rand Bank case was concerned with problems of non-disclosure and in the court a quo Trollip J said:

"The principle is that where an agent contracting in the course of his employment within the scope of his authority, fraudulently conceals or otherwise fails to disclose a fact known to him which, having regard to the nature of the contract, he ought to have disclosed to the other contracting party, his principal is liable for and must therefore suffer the consequences of his concealment or non-disclosure. That responsibility of the principal attaches, at any rate in regard to the voidability of the contract even if he himself had no knowledge of the fact not disclosed or fraudulently concealed."

The full citation of the Rand Bank case is Rand Bank Bpk Santam Versekeringsmaatskappy Bpk 1965 (2) SA 456 (W).

[16] In *Halsbury's*, 5 ed Vol 1 (2008), at para 135, pp 98-99, the following is said:

"Where, in the negotiation of any contract by an agent, the agent while acting within the scope of his authority is guilty, whether or not the principal is privy thereto, of fraud, undue influence or innocent misrepresentation, or of concealment of essential facts which ought to be disclosed to the other contracting party, the contract is voidable, and the other party thereto may rescind it and recover any benefit which has passed thereunder to the principal. If sued, the other party may successfully resist any claim brought upon the contract whether for specific performance or otherwise. Where the other party elects to affirm the contract or has lost the right to rescind, he may bring a claim for delict if the agent induced the contract by fraud, or sue for breach of warranty if the representation constituted a warranty."

[17] The question remains whether the defendant in the instant matter can be held liable for the damages suffered by the plaintiff. In *Stainer and Others v Palmer-Pilgrim* 1982 (4) SA 206 (O), the facts were briefly as follows: The plaintiffs had been the joint owners of a farm. In 1976 the defendant, who was instructed by the plaintiffs to negotiate the sale of the farm, informed the plaintiffs that one Mienie was interested in purchasing the farm and the defendant recommended the sale to him for R125 000,00. The farm was sold to Mienie in April 1976. In the meantime, before the sale, the defendant knew that another prospective buyer, one Naude, was prepared to pay more for the farm, i.e. R265 000,00. The defendant also knew that immediately after the sale, Mienie intended to sell the farm to Naude for R265 000,00. The defendant also knew that the profit made by Mienie on the re-sale would be divided equally between the defendant and Mienie. The plaintiffs subsequently sued the defendant for the full amount of the profit of the re-sale. The plaintiffs' claim was for damages for fraudulent concealment of the fact that Naude was prepared to pay more for the farm. In finding for the plaintiffs, De Wet J at p 211D-F, said:

“It is clear that the fact that the defendant was acting in his capacity as agent or servant of a company can still make him personally liable for fraudulent non-disclosure of an existing fact to a third party. An agent who commits a delict or procures its commission is personally liable at the suit of the injured party even though he was at the time acting as agent for another.”

See also Christie's *The Law of Contract in South Africa* 6th ed p 283; and LAWSA, 2nd ed. Vol 1. p 177 para 184. (Cf *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at para [30].)

APPLICATION OF LEGAL PRINCIPLE TO THE FACTS AND OTHER CASE LAW

[18] Based on the above principles, it is plain that the defendant should be held liable for the plaintiff's damages. The defendant, as attorney and conveyancer, was closely and actively involved in both contracts. He prepared the documents. He knew full-well when he contracted with the plaintiff that G & C Shelf had already concluded an earlier agreement with Paforma for the sale and cession of the same surplus equity which he purported to sell to the plaintiff. The defendant, in fact, executed the plaintiff's application form and warranted his authority to do so. However, notwithstanding his knowledge of the earlier Paforma sale, he did not disclose such sale to the plaintiff. He clearly had a duty to do so, particularly as a practising attorney and conveyancer. The defendant also knew or must have known, that the plaintiff could subsequently not sue for specific performance of the contract as G & C Shelf, his principal, had been divested of ownership of the surplus by virtue of the sale and cession to Paforma under the

3/12/2007 contract. The defendant's failure to disclose to the plaintiff the existence of the 3/12/2007 contract with Paforma clearly induced an unenforceable contract and also induced payment by the plaintiff to G & C Shelf of the amount now claimed, namely R2,5 million, on 21/12/2007.

[19] In my view, on the facts of this matter, not only did the defendant act grossly negligently and falsely by not disclosing to the plaintiff the 3/12/2007 contract with Paforma, but there is also a high probability of fraudulent conduct. In *S van der Merwe et al, Contract General Principles*, 2ed pp 237 and 241, it is clearly stated that the representor is to be held liable "*for his wrongful conduct as misrepresentor ... whether fraudulent, negligent or innocent*". In *Ruto Flour Mills (Pty) Ltd v Moriates and Another* 1957 (3) SA 113 (T) at 115 the Court made reference to *Orkin Bros Ltd v Bell and Others* 1921 (T), in which the directors of a company which was in financial difficulties, purchased large quantities of goods on behalf of the company. When the directors did the purchase, they did not actually believe that the goods would be paid for, and they acted with reckless indifference as to whether they could be paid for or not. In an action brought against the directors, it was held that they were guilty of fraudulent misrepresentation and that they were liable to the seller for the purchase price. In the present matter, the overwhelming and credible evidence is that the defendant knowingly made a false misrepresentation, not within his authority, and as such he is to be held liable for the consequence.

[20] In the present matter, the plaintiff's contractual remedy against G & C Shelf would have been to cancel what appears clearly to be an invalid contract, claim restitution of the money paid and, sue for damages. See *Wilson v Smith and Another* 1956 (1) SA 393 (W) at 396. The argument that the plaintiff cannot succeed in delict as his claim is a contractual one, is misplaced in the circumstances of this matter. As indicated earlier in the judgment, the formulation of the particulars of claim was not perfect. However, certain clear allegations in the particulars of claim as well as the undisputed evidence of Mellow, make it plain that the plaintiff's claim is in fact delictual. This is so mainly in that as a result of the defendant's wrongful misrepresentation, which was made negligently or even fraudulently, the plaintiff paid out the sum of R2 500 000,00. As a consequence, the plaintiff's patrimony was diminished. This is a clear causal connection between the wrongful conduct of the defendant and the loss suffered was the conclusion of what is undoubtedly an unenforceable contract of the 18/12/2007. What was pleaded by the defendant that reference is made on the application form to a previous undertaking provided by G & C Shelf in the amount of R2,5 million, and that notwithstanding this disclosure, the plaintiff nevertheless made no further enquiries regarding same to the defendant, is cold comfort.

[21] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A), at p 496H-I, the Court said:

"The mere fact that the respondent might have framed his action in contract therefore does not per se debar him from claiming in delict. All that he need to show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a

different manner so as to raise a claim for contractual damages is in principle irrelevant."

[22] Mellow, whose evidence I accept as credible and honest, made a good impression. He was consistent and unambiguous that had he known of the 3/12/2007 contract involving Paforma, he would not have recommended to the plaintiff's board of directors to enter into the 18/12/2007 contract. He testified about the substantial difference in effect between the undertaking disclosed and the disclosure of the Paforma contract. Mellow relied wholly on the defendant as well as previous successful business transactions with the defendant. However, Mellow did not just sit back and did nothing before the conclusion of the 18/12/2007 contract. As mentioned before, Mellow testified that he addressed an enquiry to the defendant by way of an e-mail on 18/12/2007 in which several questions were asked, and including the enquiry about the annotation. "*other/undertaking*" on the application form. He received a response from what he thought was the defendant on the same day, with which response he was contend. Mellow also did not concede in cross-examination that the defendant did not receive the e-mail, nor that the defendant was not the author of the reply to his e-mail. He rather frankly conceded that he could not dispute the latter.

[23] In my view, the criticism levelled against Mellow was not well-founded. He testified that he consistently dealt with the defendant, as a conveyancer, in a number of previous transactions involving the plaintiff. I truly can think of no reason to disbelieve Mellow on the question of e-mail.

[24] On the other hand, the defendant opted not to testify. He was present in court during the trial. The various professed versions of the defendant which were put to Mellow in cross-examination cannot have any evidential value. In my view, this is a proper matter in which to draw an adverse inference on the defendant's failure to testify. No explanation was advanced for the omission. In *Gibson v Arnold and Co (Pty) Ltd* 1951 (2) SA 139 (T) at 143B-D, the Court said:

"This point, which continually crops up in trial cases, was considered by the Court of Appeal in the case of Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A). In that case, as in the present, the Court was asked to draw an unfavourable inference from the failure to call a certain witness. In this judgment at p 79, Watermeyer CJ said:

'It is true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore, secs 285 and 286.) But the inference is only a proper one if the evidence is available and if it will elucidate the facts.'

See also *Leeuw v First National Bank Ltd* 2010 (3) SA 41 (SCA) para [20]. In the instant matter, the undisputed evidence is that the defendant was closely involved with the plaintiff before and during the 18/12/2007 contract. He prepared and signed documents and acted as agent for G & C Shelf.

CONCLUSION

[25] It was for all the foregoing reasons that I decided that the application for absolution from the instance at the end of the plaintiff's case was not well-founded. There was evidence that I could find for the plaintiff. See *Claude*

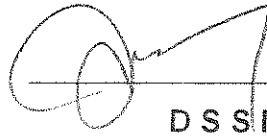
Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H. At the end of the trial, I am more than satisfied that the plaintiff has succeeded on a balance of probabilities, to prove its case against the defendant. The negligent omission or negligent misrepresentation of the defendant in circumstances where there was clearly a duty not to act negligently, caused the plaintiff to suffer pure economic loss as envisaged in *Kantj v Templer (Pty) Ltd and Another v Van Zyl* NO 2007 (1) SA 616 (WCC) at para [27]. The plaintiff paid the sum of R2 500 000,00 to the defendant on 21/12/2007. The plaintiff argued for the interest payable to be calculated from the latter date. I am not sufficiently persuaded that this would be justified. I am inclined to order interest to be calculated rather from 28/8/2008, which was the date of the letter of demand. In regard to costs, there is no reason why the costs should not follow the result.

ORDER

[26] In the result I make the following order:

- 1 The defendant is ordered to pay to the plaintiff the sum of R2 500 000.00 (Two Million Five Hundred Thousand Rand).
- 2 Interest on the said amount calculated from 28/8/2008 to date of final payment at the rate of 15,5% per annum.

3. Costs of suit.



D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG
R M VAN ROOYEN

COUNSEL FOR THE PLAINTIFF

INSTRUCTED BY

LYNN AND MAIN ATTORNEYS

COUNSEL FOR THE DEFENDANT

J VAN ROOYEN

INSTRUCTED BY

GREYLING ORCHARD ATTORNEYS

DATE OF HEARING

4 MAY 2012

DATE OF JUDGMENT

23 AUGUST 2012

S U M M A R Y

Principal and agent – defendant acting as agent for company in sale agreement disposing surplus equity in immovable property to plaintiff as seller. The defendant purposely or fraudulently concealing to plaintiff that *merx* already sold by company to another purchaser – the defendant as attorney and conveyancer by such concealment not relieved of liability to injured party for damages for his delict – failure of defendant to testify leading to adverse inference drawn by court.